

## INDEX

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	Page
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	2
Statute and regulations involved .....	2
Statement .....	2
Argument .....	4
Conclusion .....	7
Appendix .....	8

### CITATIONS

#### Cases:

<i>Heiner v. Donnan</i> , 285 U. S. 312 .....	4
<i>Igleheart v. Commissioner</i> , 77 F. 2d 704 .....	4
<i>Milliken v. United States</i> , 283 U. S. 15 .....	4
<i>Schoenheit v. Lucas</i> , 44 F. 2d 476 .....	4
<i>Snyder v. Helvering</i> , 69 F. 2d 377 .....	4

#### Statute:

Internal Revenue Code, Sec. 811 (26 U. S. C. 1940 ed., Sec. 811) .....	2, 4, 8
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#### Miscellaneous:

Treasury Regulations 105, Sec. 81.15 .....	5, 8
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(I)



# ***In the Supreme Court of the United States***

OCTOBER TERM, 1947

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No. 381

ESTATE OF ALBERT PATTERSON HUMPHREY, DE-  
CEASED, JOE A. HUMPHREY, INDEPENDENT EXEC-  
UTOR, PETITIONER

*v.*

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH  
CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## **OPINIONS BELOW**

The memorandum opinion of the Tax Court (R. 30-31) is not reported; the opinion of the Circuit Court of Appeals (R. 77-79) is reported at 162 F. 2d 1.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals was entered on July 2, 1947 (R. 77-79). The petition for a writ of certiorari was filed on October 1, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

#### QUESTION PRESENTED

Whether, in the circumstances, the courts below erred in sustaining the Commissioner's determination of the value, for estate tax purposes, of the gift which was made here in contemplation of death.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations will be found in the Appendix, *infra*, p. 8.

#### STATEMENT

There were several issues tried to the Tax Court in this case, among which was whether decedent Humphrey's gift of \$40,000 to his sons, made within two years preceding his death, was a transfer "in contemplation of death" within the meaning of Section 811 (c) of the Internal Revenue Code. Appendix, *infra*, p. 8. The Tax Court held (R. 30) that it was such a transfer, and entered decision (R. 31) sustaining the Commissioner's determination (R. 14) that the \$40,000 which was the subject of the transfer was includible in decedent's estate accordingly. No contention was made in the Tax Court that \$40,000 was not the correct evaluation of the gift, assuming its inclusion to be proper; and the Tax

Court made no findings of fact with respect to value, nor any mention of the matter in its opinion. (R. 30-31, 78.)

In the Circuit Court of Appeals, where petitioner first questioned the correctness of the Commissioner's valuation figure, as well as there challenging the Tax Court's decision that the transfer in question was includible under the statute, the court, in sustaining both the determination of the character of the gift and the amount includible, stated (R. 78) that the evidence indicated "that the two sons took the \$80,000 given by their parents [\$40,000 of which was concededly the decedent's gift] and combined it with \$80,000 of their own and by their operations prior to their father's death had lost about half of the \$160,000 capital". The court concluded, however, that this loss was irrelevant in determining the value of the gift to be included in the decedent's gross estate.

The petitioner has now abandoned the issue with respect to the character of the transfer; his only contention on petition to this Court is that by reason of the transferees' subsequent loss of about half of their "composite" capital, the value of the includible property should be \$20,000 instead of \$40,000 as determined.<sup>1</sup>

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<sup>1</sup> Actually there is no proof that half of the gift had been irretrievably lost. Indeed there is no showing of the fair market value of the assets of Humphrey Brothers or of the partnership interest acquired with the gift.

## ARGUMENT

There is no occasion for further review of this case. The issue which petitioner raises was not raised in the Tax Court, and the record does not clearly indicate a factual basis for deciding it. In any event the issue as posed by the petitioner was correctly decided below, presents no conflict among the circuits, and, while the question is indeed a "novel" one, the answer is readily made, we submit, under well-established principles of law.

Section 811 (c) of the Internal Revenue Code and the concomitant Regulations (Appendix, *infra*, p. 8) provide that property transferred in contemplation of death, within the statutory meaning, shall be included in the decedent transferor's estate at its value as of the time of his death. The petitioner concedes (Pet. 12-13) that the rationale of the statute is that property transferred by the decedent during his lifetime in contemplation of death is to be regarded as having remained in his possession until his death. *Heiner v. Donnan*, 285 U. S. 312; *Snyder v. Helvering*, 69 F. 2d 377 (App. D. C.); *Schoenheit v. Lucas*, 44 F. 2d 476 (C. C. A. 4th); *Igleheart v. Commissioner*, 77 F. 2d 704, 711 (C. C. A. 5th). As was stated by this Court in *Milliken v. United States*, 283 U. S. 15, 22, by the 1916 Act, Congress adopted a well understood system of taxation on transfers at death, already in force in forty-two states, a

characteristic feature of which was to impose taxes on transfers made in contemplation of death, computed at the same rate and, as if the property given had been a part of the donor's estate at his death.

Obviously the decedent himself did not dissipate the property and the improvidence of the donees in dissipating it cannot be attributed to him. The assumption must necessarily be made that had decedent not made the gift, the property would have remained intact in his possession until his death and would have passed as a result thereof. To deprive the gift of half its value because of the donees' improvidence would, however, require the conclusion that Congress meant its declared purpose in imposing a tax on gifts in contemplation of death to be thwarted in every case where the donee dissipates the property. There is no logical justification for such a result. We submit that the court below properly held that the fact that the donees dissipated the property was irrelevant in determining its value at the date of death.

The Regulations (Appendix, *infra*, p. 8) throw little, if any, light upon the subject. They do deal with additions and betterments to the property made by the donee, which enhance its value; and in that connection provide that the value of such additions or betterments should not

be taken into consideration. By a parity of reasoning, we think it may logically be said that detriment suffered in the value of the property due to the act of the donee, is likewise not to be taken into consideration.<sup>2</sup>

Moreover, petitioner has made no case even if, *arguendo*, his legal theory were sound. He asks, in effect, for a pro-rata sharing of the partnership losses between the Government's interest in the estate and the partner-heirs—and this on a wholly hypothetical assumption that the decedent's \$40,000 gift was actually lost pro-rata with the other funds belonging to the co-partnership. The assumption is one we see no valid reason for making. It would be equally logical, we submit, if not more so on the facts of the case, to apply the "first money in, first money out" rule here, and to say that since the decedent's gift was admittedly (Pet. 5) "combined" with partnership funds already existing, it was those latter funds which were first spent and first lost. That would leave the decedent's gift quite intact, and therefore includible in his estate, even under the petitioner's own proposition.

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<sup>2</sup> The hypothetical case put by petitioner (Pet. 13) obviously gives rise to questions vastly different from that here involved.



**CONCLUSION**

The petition for certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,  
*Solicitor General.*

✓ THERON LAMAR CAUDLE,  
*Assistant Attorney General.*

HELEN R. CARLOSS,  
MARYHELEN WIGLE,  
*Special Assistants to the Attorney General.*

OCTOBER, 1947.

## APPENDIX

### Internal Revenue Code:

#### SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States \* \* \*.

\* \* \* \* \*

(c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, \* \* \*

(26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.15.—*Transfers during life.*—  
\* \* \*

The value of transferred property includible in the gross estate is the value thereof at the date of decedent's death, \* \* \*. If the transferee has made additions to the property, or betterments, the enhanced value of the property due thereto should not be included.

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